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No. 06-769

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DONALD WEEMS and MICHAEL BRIGGS,

Petitioners,

v.

LAWRENCE JOHNSON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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ARGUMENT

REASONS TO DENY THE PETITION

I. Any difference in the procedures used by different states to identify, classify, and assess sexual offenders does not create a procedural due process argument, and as a matter of state law is not subject to federal constitutional review.

The petitioners[1] ("Weems") contend that the Arkansas systems of sexual offender registration, and the assessment process, violate procedural due process guarantees of the U.S. Constitution. In doing so, Weems suggests that there is a conflict between the Third and Eighth Circuit Courts of Appeal, as well as several states, because different burdens of proof, or appellate remedies, are used by different states. As will be shown below, there is no conflict between the federal circuits. As to the state law cases, these merely demonstrate different statutory approaches by different states.

This Court has already recognized that "sex offenders are a threat to this Nation." *McKune v. Lile*, 536 U.S. 244, 32 (2002). In dealing with such a threat, "states are not denied by principles of procedural due process from"

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[1] The Court should note that even before the U.S. Court of Appeals for the Eighth Circuit rendered its opinion, petitioner Donald Weems was incarcerated by the State of Arkansas for a new conviction of kidnapping and felony sexual solicitation of a child. His prison sentence is due to expire on May 12, 2008. http://www.arkansas.gov/doc/inmate_info/search.php?dcnum=132606&lastname=Weems&firstname=Donald&sex=M&agetype=1&RACE=W&_utma=7441378.75555919.1160167741.1170965704.1174581209.6&_utmz=7441378.1174581209.6.3.utmccn%3D%28referral%29%7Cutmcsr%3Daccessarkansas.org%7Cutmcct%3D%2Fgovernment_name.php%7Cutmcmd%3Dreferral (last accessed March 22, 2007).

drawing classifications as to these offenders, or from providing different means to enforce these classifications. *See Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989). This Court has already upheld state statutes that require special post-incarceration procedures to be followed by sex offenders. *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003).

Weems contends that the Arkansas approach to registration, setback requirements for living near certain protected groups, and classification of offenders, violates procedural due process because an offender never has an opportunity to be represented by counsel, or to see all of the documentary evidence used in the initial assessment. (Pet. Brief at 8). This assertion simply misrepresents the process.

First, the State does not engage in a whimsical decision as to classification. More to the point, the information required for such a review is easily identifiable. The SEX OFFENDER ASSESSMENT COMMITTEE GUIDELINES AND PROCEDURES 2007 is readily accessible. http:www.sos.arkansas.gov/ar_rules/proposed1004.00.07_001P.pdf (last accessed on March 22, 2007). These guidelines and procedures set forth the makeup of the committee, the offenses targeted for consideration, and the various procedures to be followed once an assessment is made. Information gathering is set out in detail. The offender is granted a Fifth Amendment right against self-incrimination so that comments made during an interview are never used to prosecute. Id. at 9. If, at the end of the process the offender is not satisfied with an assessment, a judicial review is permitted under the Arkansas Administrative Procedures Act. Ark. Code Ann. §§ 25-15-201 to -218 (West 2004).

At this hearing, the offender is entitled to counsel. While the burden is on the offender to show that there is no substantial evidence to support the Assessment Committee's conclusion, this standard is not impossible to meet. If the offender can demonstrate a reasonable suspicion of bias on the part of the Committee, making the hearing unfair, the trial court can reverse the decision. *Wacaser v. Ins. Comm'r*, 321 Ark. 143, 900 S.W.2d 191 (1995). If there were certain Committee members whose opinion weighed more heavily than others, the offender is entitled *as a matter of law* to present impeaching evidence. *Cyphers v. United Parcel Service*, 68 Ark.App. 62, 3 S.W.3d 698 (1999). The offender is provided a copy of the entire record at agency expense. *See* Ark. Code Ann. § 25-15-212 (d) (West 2004). With this evidence, and the additional grounds for reversal noted above, the offender will attempt to show that the Committee decision is not supported by substantial evidence. *Arkansas Soil & Water Conservation Comm'n v. City of Bentonville*, 351 Ark. 289, 92 S.W.3d 47 (2002). This means that the Committee's evidence does not support its finding. Id., at 301, 54.

This review is in addition to the administrative review the offender can request *before* the classification becomes effective in the first place. SEX OFFENDER ASSESSMENT COMMITTEE GUIDELINES & PROCEDURES at 16. In addition, once an assessment is made, the offender may petition the Committee for a decrease in classification after certain treatments are completed; evidence shows that any action was a temporary aberration; the assessment varies from the *current* state of the record, e.g., a witness recants; or, that the sex offense was without violence and was not indicative of a pattern of behavior. Id. at 14.

To be sure, the Arkansas process is not the same as the states listed by Weems in his petition. The U.S. Constitution does not require that it has to be. Indeed, if you accept this argument, then the Court would have to contend that every state have the same procedure to deal with every offense. It is clear that has never been the intent of the Constitution. Even at its inception, the document recognized, for example, that some states would authorize capital punishment and some would not. The Fifth Amendment guarantee was a limitation on those states that did, and that limitation was merely that it be imposed with due process of law. In other words, different procedures in different states does not raise a constitutional question that this Court has to consider.

Weems is also concerned about how "future dangerousness" is determined. Evidently, he thinks that more guidance should be given to the fact finder of such a significant issue. Yet, in another context, this Court has already rejected such a claim. For example, this Court upheld the Texas death penalty statute even though it required the jury to impose death upon certain findings, one of which was future dangerousness. *Jurek v. Texas*, 428 U.S. 262 (1976). The fact that a jury might act on speculative basis when it makes such a finding does not constitute a due process violation. *Estelle v. Smith*, 454 U.S. 454, 472-73 (1981).

More to the point, the Court has expressly noted that it does not substitute its view for those of state legislatures that impose capital sentencing and decide which "particular substantive factors [are] chosen to narrow the class of defendants eligible for the death penalty." *California v. Ramos*, 463 U.S. 992, 999-1000 (1983). The fact that not all states have statutes with the same procedure does

not create a constitutional problem. "The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" *Gregg v. Georgia*, 428 U.S. 153, 192 (1976); *California v. Ramos*, 463 U.S. at 1000.

For this discussion, the relevant fact is that how these procedures are put into place, as this Court has stated, are "peculiarly questions of legislative policy." If a jury, without any guidance whatsoever as to the meaning of future dangerousness, can constitutionally sentence a man to death, then surely the State of Arkansas, governed by guidelines and procedures, can determine that a sexual offender meets a particular category of danger to the community and, in the process, impose different post-conviction requirements. If other states require other procedures, it is because the legislative bodies in those states made different decisions. It is not a federal constitutional issue. Indeed, it is peculiarly a state law issue.

CONCLUSION

For the reasons set forth above, the writ should be denied. Weems confuses different approaches by different state legislatures as a conflict among the federal circuit courts which warrants this Court's review. It is not. This petition merely asks this Court to rule the Arkansas procedure to be unconstitutional. Yet, as demonstrated above, no federal constitutional rationale for such a ruling is ever provided.

Respectfully submitted,

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